

APPEAL NO. 93136

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01-11.10 (Vernon Supp. 1993) (1989 Act). Following a contested case hearing on January 20, 1993, in (city), Texas, hearing officer (hearing officer) determined that the claimant's cervical condition is the result of her compensable injury of (date of injury), and she ordered the carrier to pay temporary income benefits (TIBS) in accordance with the decision and the 1989 Act. The appellant (carrier herein) contends the hearing officer erred in finding that the respondent (claimant herein) told her doctor about the pain in her neck from the time of her injury and that she had no prior or subsequent injuries to her neck which could have caused a herniated cervical disk. Carrier also contends the hearing officer erred in concluding the claimant's cervical condition was the result of her March 27th injury, and asks that we reverse the hearing officer's decision and order.

DECISION

We affirm the hearing officer's decision and order.

The claimant, who was employed by (employer), testified through an interpreter that on (date of injury), she was pushing a cart of clothes weighing 700 pounds. The cart got stuck in a crack in the floor, and, as the claimant pulled it in an effort to get it out, she fell backwards. She said her head went forwards and backwards, and she landed in a sitting position. The claimant said she immediately felt pain like an electric shock from her coccyx all the way up her back and that she became dizzy.

The claimant has seen several doctors since her injury. On the day of the injury the claimant saw Dr. N, although she said he refused to treat her. Dr. N report of that date notes tenderness in the lower abdomen and back, and gave a diagnosis of "questionable musculoskeletal pain." The report also said: "[r]efer to orthopedist - I cannot help her; maximum complaints and minimal physical findings." On March 28, 1991 she was referred to Dr. P, an orthopedic surgeon, who diagnosed low back strain and took her off work for one week; an April 4th report was essentially the same and released her to work on April 8th. Following a telephone conversation with claimant's daughter, who disputed the release to return to work, Dr. P referred the claimant to an orthopedic surgeon, Dr. P, because he said he "did not feel that under these circumstances I was in any position to take further care of [claimant]."

Dr. P report of April 12th gave a history of pain in her entire back, but also said the claimant presented with low back pain with radiation to the right leg. Reports of April 26 and June 6, 1991 visits to Dr. P record the claimant's complaints of low back pain with bilateral leg radiation; neck pain is not mentioned. Dr. P recommended an MRI of the lumbosacral spine, which was negative. A bone scan showed "no present evidence of active healing in the sacral coccygeal region. This activity might have returned to normal after 2 months."

The record next reflects that the claimant was seen on July 3, 1991 by Dr. P, a neurosurgeon. Dr. Pacheco's letter summarizing that visit says Dr. P referred the claimant because of her post-traumatic complaints of pain in the lumbosacral area with radiation along the paraspinal muscle group of the "entire vertebral column." He also recorded that the claimant's accident was immediately followed by significant pain mainly in the region of the tail bone, but that subsequently the pain began to radiate "all the way up to the base of the neck, through the midline of the vertebral column." Nevertheless, Dr. Pacheco found the claimant's neck supple with mild musculoskeletal pain at the level of the cervical/thoracic junction. He agreed with Dr. P's recommendation for aggressive, conservative treatment.

On August 29, 1991 the claimant was again seen by Dr. P. Although his letter of that date says the claimant was seen for a follow-up of a problem with the low back, neck, and mid back, it describes and discusses only her thoracolumbar and lumbar areas, as does Dr. P's Specific and Subsequent Medical Report (Form TWCC-64) of the same date.

On claimant's next visit to Dr. P on November 12, 1991, he again says she is seen "for follow-up of a problem with the low back and bilateral leg pain, mid cervical spine pain and head pain." He also records symptoms of headache and inability to sleep due to pain when lying down; however, he again examined claimant only in the lumbar area.

The claimant testified that because Dr. P would not pay any attention to her complaints of neck pain, she began seeing Dr. U in December 1991. The first medical report from Dr. U in the record is dated March 3, 1992; that report records complaints of lower back and cervical pain, and a cervical spine x-ray was performed. Dr. U stated his opinion that the "examination and radiographic findings support a causal relationship with the history of the accident," and he recommended a cervical MRI to rule out a cervical disk herniation. Dr. U referred the claimant to Dr. S, a neurosurgeon, who read claimant's MRI and diagnosed a herniation at C4-5, moderate to severe. He recommended an EMG and NCV of the upper extremities and, if those tests were positive, a cervical myelogram and possibly surgery.

On January 28 and September 10, 1992, the claimant was seen by Dr. P for an independent medical examination. Dr. P's first IME report diagnosed low back and thoracic strain, but stated the claimant had evidence of significant symptom magnification and "I do not feel that any orthopedic intervention will be of any benefit to this patient." The claimant's neck was not mentioned. In the second report, Dr. P again diagnosed low back and thoracic strain with significant psychosomatic overlay. He said the claimant's main problem at the time of the exam appeared to be her neck, including headaches and dizzy spells. However, Dr. P stated that "I do not feel that the patient's neck problem or even the incidental finding of degenerative changes at the neck level and herniated disc at the C4-5 level is related at all to the original injury." Dr. P had earlier given this opinion; in a June 18, 1992 letter to the carrier he said that the claimant had never mentioned a neck problem when she

saw him; that upon review of her chart he did not see any evidence of injury to the neck; and that "I clearly remember this patient and she has evidence of symptom magnification. Most of her problems are psychosomatically related."

The claimant stated at the hearing that she told her doctors about neck pain, and again described it as an electric shock moving from her coccyx upward to the top of her spine. Her adult daughter testified that she accompanied her mother to many of the doctor visits and served as her mother's interpreter. She said her mother told Dr. P of headaches and pain in the back and neck. She also said Dr. P was told about the claimant's neck pain, and that he told her her mother was "just spoiled." Both claimant and her daughter testified that the claimant had no prior or subsequent injuries to her neck, and that she had suffered no neck problems prior to the accident on (date of injury).

The claimant said her treating doctor, as of the date of the hearing, was Dr. B. The claimant said, and the medical records reflect, that he was only treating her back pain. The claimant said the carrier had prohibited him from treating her cervical problems.

The carrier in its appeal contends that the hearing officer's decision is against the great weight and preponderance of the evidence. It recites medical reports in the record, and contends that each doctor that treated the claimant prior to March 1992 (when Dr. S diagnosed a cervical problem) diagnosed lumbar or thoracic strain or sprain; that Dr. P believed her cervical problems were not job related, and that no doctor had opined that they were. The carrier further states claimant's own testimony is not reliable because she demonstrated memory problems at the hearing, and that her daughter is clearly an interested witness. The claimant in response points out that even though her cervical condition was not medically diagnosed until after the initial injury, the symptoms are shown in early medical reports. She further argues that she and her daughter testified that she informed her doctors of a neck problem but that she was hampered by a language problem.

Much of the medical evidence in this case clearly would have supported a decision contrary to the one reached by the hearing officer. It is our duty, however, to determine whether the other evidence in the record is sufficient to support the decision actually rendered, and whether that decision is against the great weight and preponderance of the evidence. The hearing officer is the sole judge of the relevance and materiality of the evidence offered and of its weight and credibility. Article 8308-6.34(e). A claimant's testimony, if believed, can support a finding of injury in the course and scope of employment. Highlands Insurance Co. v. Baugh, 605 S.W.2d 314 (Tex. Civ. App.-Eastland 1980, no writ). Where, as here, the claimant's testimony conflicts with other evidence the hearing officer is entitled to resolve such conflict. Burelsmith v. Liberty Mutual Insurance Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). Further, the hearing officer can accept lay testimony over that of medical experts. Houston General Insurance Co. v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.).

In the current case, the hearing officer was entitled to believe the claimant's testimony that her pain extended from her tailbone to her neck and that she mentioned such injury to her doctors. Claimant's statement that she stopped seeing Dr. P because he ignored her complaints of neck pain is corroborated by his medical records which note neck pain but proceed to only discuss and diagnose lower back problems. The next doctor she saw after Dr. P, Dr. U, examined her for neck complaints and referred her to the doctor who diagnosed a herniated cervical disk. Given these facts in evidence, and even considering the absence of earlier noted complaints of neck pain as well as Dr. P strong opinion that claimant's complaints were psychosomatic, we find that the hearing officer's decision and order are not so against the great weight and preponderance of the evidence as to be manifestly unjust and unfair. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). The hearing officer's decision thus will not be set aside, even though different inferences and conclusions could be drawn from the same evidence. Garza v. Commercial Insurance of Newark, N.J., 508 S.W.2d 701 (Tex. App.-Amarillo 1974, no writ).

The hearing officer's decision and order are affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Thomas A. Knapp
Appeals Judge